

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B04

PLR-104377-08

Date: AUGUST 01, 2008

Re:

Decedent	=
Spouse	=
Trust	=
Trust 1	=
Trust 2	=
Trust 3	=
Trustee	=
CPA	=
Accounting Firm	=
Date 1	=
Year 1	=
<u>X</u>	=
<u>Z</u>	=

Dear :

This is in response to your authorized representative's letter, dated July 10, 2008, and prior correspondence, requesting an extension of time under § 301.9100-3 of the Procedure and Administrative Regulations to sever a trust, make a reverse qualified terminable interest property (QTIP) election under § 2652(a)(3) of the Internal Revenue Code, and allocate generation-skipping transfer (GST) exemption pursuant to § 2642(g) to a trust.

### Facts

The facts and representations submitted are summarized as follows.

Prior to his death, Decedent established a Living Trust (Trust). Section 4.2 of Trust provides that at the Decedent's death, the Trust was to be divided into two parts,

the Marital Share and the Bypass Share. Trust further provides that the Marital Share is to be further divided into two parts, the GST Marital Trust (Trust 1) and the Residuary Marital Trust (Trust 2). The Bypass Trust (Trust 3) is held for the benefit of Spouse, Decedent's children and grandchildren, and a charity.

Section 4.2(a)(iii)(A) requires that Trust 1 be funded with an amount equal to Decedent's available GST exemption. Under section 4.4(c), at the death of Spouse, Trust 1 and Trust 3 are to be combined and distributed under section 4.3(b) outright to Decedent's children and grandchildren and, if none of the beneficiaries are then living, to a charity.

Section 5.1(q) provides that Trustees are instructed to divide a trust which would otherwise be partially exempt from GST (prior to funding) into two trusts so that one of these trusts is entirely exempt from GST tax.

Decedent died on Date 1, survived by Spouse, their children, and grandchildren. Spouse retained CPA to prepare Decedent's Form 706 United State Estate (and Generation-Skipping Transfer) Tax Return. On Schedule M of Form 706, an election was made under § 2056(b)(7) to treat Trust 1 and Trust 2 as qualified terminable interest property. However, no reverse QTIP election under § 2652(a)(3) was made. Accordingly, Decedent's GST exemption was not allocated to Trust 1 or Trust 2. Under § 2632(e)(1)(B), \$X of Decedent's GST exemption was automatically allocated to Trust 3 because Decedent was the transferor for purposes of § 2652(a)(1) and a taxable distribution or taxable termination could be made from Trust 3. Decedent's remaining GST exemption equal to \$Y was not automatically allocated under § 2632(e)(1)(B) to Trust 1 or Trust 2, because without the reverse QTIP election, Decedent is not treated as the transferor for purposes of § 2652(a)(1). In Year 1 when Accounting Firm was planning for Spouse's estate, Accounting Firm advised Spouse that Trust 1 should have been divided into two trusts pursuant to Trust and a reverse QTIP election should have been made with respect to one of the divided trusts in order to allocate Decedent's remaining GST exemption to the trust.

You have requested the following rulings:

1. An extension of time under § 301.9100-3 and § 26.2654-1(b)(1) to sever GST Marital Trust into a GST Exempt Marital Trust and a GST Non-exempt Marital Trust;
2. An extension of time under § 301.9100-3 to make a reverse QTIP election under § 2652(a)(3) with respect to GST Exempt Marital Trust;
3. An extension of time under § 301.9100-3 and § 2642(g)(1) to allocate Decedent's remaining GST exemption to GST Exempt Marital Trust, to be effective as of Decedent's date of death.

### Law and Analysis

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2056(a) provides that, for purposes of the tax imposed by § 2001, the value of the taxable estate is, except as limited by § 2056(b), to be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

Under § 2056(b)(1), no deduction is allowed for an interest passing to the surviving spouse if, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, the interest will terminate or fail.

Section 2056(b)(7)(A) provides that, in the case of qualified terminable interest property, for purposes of § 2056(a), such property is treated as passing to the surviving spouse, and for purposes of § 2056(b)(1)(A), no part of such property is treated as passing to any person other than the surviving spouse.

Section 2056(b)(7)(B)(i) defines the term “qualified terminable interest property” as property: (i) which passes from the decedent; (ii) in which the surviving spouse has a qualifying income interest for life; and (iii) to which an election under § 2056(b)(7) applies. Under § 2044, property subject to a QTIP election for which a deduction is allowed under § 2056(b)(7) applies, is includible in the surviving spouse’s gross estate on that spouse’s subsequent death.

Section 2601 imposes a tax on every generation-skipping transfer. A generation-skipping transfer is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

Section 2631(a), as in effect for the tax year at issue, provides that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 (adjusted for inflation under § 2631(c)) which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, shall be irrevocable.

Section 2632(a)(1) provides that any allocation by an individual of his or her GST exemption under § 2631(a) may be made at any time on or before the date prescribed

for filing the estate tax return for such individual's estate (determined with regard to extensions), regardless of whether such a return is required to be filed. Section 26.2632-1(d)(1) of the Generation-Skipping Transfer Tax Regulations provides that an allocation of decedent's unused GST exemption by the executor of the decedent's estate is made on the Form 706, filed on or before the date prescribed for filing the return by § 6075(a) (including any extensions actually granted).

Section 2632(e)(1) provides that any portion of an individual's GST exemption which has not been allocated within the time prescribed by § 2632(a) shall be deemed to be allocated as follows: (A) first, to property which is the subject of a direct skip occurring at such individual's death, and (B) second, to trusts with respect to which such individual is the transferor and from which a taxable distribution or taxable termination might occur at or after such individual's death. However, no automatic allocation of GST exemption is made to a trust that will have a new transferor with respect to the entire trust prior to the occurrence of any GST with respect to the new trust. See Reg. § 26.2632-1(d)(2).

Section 2642(g)(1)(A) provides that the Secretary shall by regulation prescribe such circumstances and procedures under which extensions of time will be granted to make an allocation of GST exemption described in § 2642(b)(1) or (2), and an election under § 2632(b)(3) or (c)(5). Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of this paragraph.

Section 2642(g)(1)(B) provides that in determining whether to grant relief under this paragraph, the Secretary shall take into account all relevant circumstances, including evidence of intent contained in the trust instrument or instrument of transfer and such other factors as the Secretary deems relevant. For purposes of determining whether to grant relief under this paragraph, the time for making the allocation (or election) shall be treated as if not expressly prescribed by statute.

Section 2652(a)(1) provides that for purposes of chapter 13, the term "transferor" means, in the case of property subject to the tax imposed by chapter 11, the decedent. An individual shall be treated as transferring any property with respect to which such individual is the transferor.

Section 2652(a)(3) provides that in the case of any trust with respect to which a deduction is allowed to the decedent under § 2056(b)(7), the estate of the decedent may elect to treat all of the property in the trust, for purposes of chapter 13, as if the QTIP election had not been made (reverse QTIP election).

Section 26.2652-2(a) provides that a reverse QTIP election is not effective unless it is made with respect to all of the property in the trust to which the QTIP election

applies. Section 26.2652-2(b) provides that a reverse QTIP election is made on the return on which the QTIP election is made.

Section 26.2654-1(b)(1) provides that the severance of a trust that is included in the transferor's gross estate (or created under the transferor's will) into two or more trusts is recognized for purposes of chapter 13 if the trust is severed pursuant to a direction in the governing instrument providing that the trust be divided upon the death of the transferor.

Section 26.2654-1(b)(3) provides that an individual's GST exemption under § 2632 may be allocated to the separate trusts created pursuant to § 26.2654-1(b) at the discretion of the executor or trustee.

Under § 301.9100-1(c), the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I.

Section 301.9100-3 provides the standards the Commissioner will use to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute). Under § 301.9100-1(b), a regulatory election includes an election whose due date is prescribed by a notice published in the Internal Revenue Bulletin. Notice 2001-50, 2001-2 C.B. 189, provides that taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3.

Requests for relief subject to § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

In this case, as a result of the QTIP election made on Decedent's Form 706, the assets of Trust 1 and Trust 2 are includible in Spouse's gross estate pursuant to § 2044. Spouse is considered the transferor of Trust 1 and Trust 2 assets for GST tax purposes. Therefore, Decedent's GST exemption could not be allocated to those trusts at his death. However, if Trust 1 is severed into two trusts, a GST Exempt Marital Trust and a GST Non-exempt Marital Trust, and a reverse QTIP election is made with respect to GST Exempt Marital Trust, then Decedent will be treated as the transferor of the GST

Exempt Marital Trust assets, and Decedent's remaining GST exemption may be allocated to that trust.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 and § 26.2654-1(b) have been satisfied. Therefore, Decedent's estate is granted an extension of time of 60 days from the date of this letter to sever Trust 1 into a GST Exempt Marital Trust and a GST Non-exempt Marital Trust; to make a reverse QTIP election pursuant to § 2652(a)(3) with respect to GST Exempt Marital Trust, and to allocate Decedent's remaining GST exemption to GST Exempt Marital Trust. The allocation will be effective as of the date of Decedent's death.

The reverse QTIP election and the allocation should be made on a supplemental Form 706 and filed with the Cincinnati Service Center at the following address: Internal Revenue Service, Cincinnati Service Center – Stop 82, Cincinnati, OH 45999. A copy of this letter should be attached to the supplemental Forms 706.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as specifically ruled herein, we express or imply no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provisions of the Code.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,

William P. O'Shea  
Associate Chief Counsel  
(Passthroughs & Special Industries)

Enclosures

Copy for § 6110 purposes  
Copy of this letter